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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 623

EASTERN EXPRESS, INC., THE EASTERN CENTRAL MOTOR CARRIERS ASSOCIATION, INC., NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC., REGULAR COMMON CARRIER CONFERENCE OF AMERICAN TRUCKING ASSOCIATIONS, INC., *Appellants*

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, *Appellees*

On Appeal from the United States District Court for the Southern District of Indiana, Terre Haute Division

MEMORANDUM FOR APPELLANTS IN OPPOSITION TO MOTIONS TO AFFIRM

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February 9, 1962

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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In its motion to affirm, the Government asserts that this case does not warrant plenary consideration by this Court because, it says, appellants seek only to challenge the substantiality of evidence before the Commission and to "dispute the wisdom with which the Commission resolved issues of transportation policy

committed by Congress to the agency's discretion." (P. 6 of Motion to Affirm). This is an inaccurate description of this appeal for the principal matter which appellants would bring before this Court is the failure of the Commission both to recognize and to resolve fundamental issues of transportation policy as required of it by Congress.

In their motion to affirm, the freight forwarders assert that the forwarder rates at issue are neither new nor apply for a novel service (P. 3 of Freight Forwarders' Motion to Affirm). Yet, the facts are that this Court has always recognized forwarders as specialists in the field of small-shipment transportation[1] and in this very case the Interstate Commerce Commission found and the court below agreed (J.S. 9a-10a, 23a-24a, 36a-37a), that the provision by freight forwarders of trailerload transportation performed in vehicles furnished by the forwarders is an entirely new operation made economically possible by the new Plan III and Plan IV TOFC services of the railroads. The foregoing leads necessarily to the conclusion that by the new operation forwarders would for the first time become competitive with motor carriers (and with railroads, for that matter) for general trailerload traffic. The lawfulness of this new competition is the basic issue which the Commission has neither recognized nor decided. The non-resolution of that issue is of critical significance because the paramount importance of this case is the public interest in an adequate system of public transportation at all points, large and small.

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[1] *United States* v. *Chicago Heights Trucking Company*, 310 U.S. 344 (1940), and *Chicago M. St. P. & Pac. R. Co.* v. *Acme Fast Freight*, 336 U.S. 465 (1949).

In *Eastern Central Motor Carriers Association* v. *United States*, 321 U.S. 194, 205-206 (1944), the Supreme Court, after commenting upon the obligation of the Commission during the time it was charged only with the regulation of the railroads, said the following:

> "But with the evolution of other forms of carriage, particularly motor carriage, and the commission's acquisition of control over their rates and operations, a new situation arose. The Commission's task no longer was merely the regulation of a single form of transport, to secure reasonable and nondiscriminatory rates and service. It became, not merely the regulator, but to some extent the coordinator of different modes of transportation. With the addition of motor and water carriage to its previous jurisdiction over rails, it was charged not only with seeing that the rates and services of each are reasonable and not unduly discriminatory, but that they are coordinated in accordance with the National Transportation Policy, as declared by the later legislation. This, while intended to secure the lowest rates consistent with adequate and efficient service and to preserve within the limits of the policy the inherent advantages of each mode of transportation, at the same time was designed to eliminate destructive competition not only within each form but also between or among the different forms of carriage."

The Commission has failed to discharge the duty so plainly stated by this Court in the *Eastern Central* case. Freight forwarders are adjunctive carriers required by statute to function only through utilization of the line-haul services and instrumentalities of the physical and primary carriers. Yet, in spite of that fact, the Commission has approved the commencement by the forwarders of an entirely new type of opera-

tion without analyzing the competitive impact thereof upon the continuing capabilities of those physical carriers, the very operations of which give the forwarders life. As a consequence, the Commission has utterly failed to give consideration to the effect of the new forwarder service upon the national transportation system in which the public interest rests. This failure on the part of the Commission is the antithesis of the goal of regulation which requires the Commission to administer the Act "all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense."[2]

Demonstrative of the Commission's failure to treat of the foregoing fundamental consideration is the complete lack of any reference whatever to the National Transportation Policy in the Commission's first report (J.S. 21a-31a). A further demonstration is provided by the Commission's second report (J.S. 35a-42a) issued after the reopening of the proceeding on the Commission's own motion. The latter report dismissed, as unimportant to the issues, appellants' request for answers to the following questions:

> "Would not the aforesaid service by the forwarders be the substantial equivalent of the Plan II service of the railroads and the regular service of the motor carriers insofar as trailerload traffic is concerned?"
>
> "Would not the forwarder transportation of trailerloads generally conform to the pattern of

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[2] National Transportation Policy (49 U.S.C. preceding §§ 1, 301, 901, 1001).

> the forwarder transportation of small shipments in that it would be performed only between points of substantial traffic importance?"
>
> "Would not forwarder transportation of volume shipments between only principal points and the consequent diversion of such from motor carriers impair the ability of motor carriers to continue to provide transportation between both large and small communities at just and reasonable rates which avoid undue discriminations between localities, regions, territories, and descriptions of traffic?"

The nearest the Commission came to a discussion of the new forwarder service *vis a vis* the national transportation system is a statement in its second report as set forth at page 39a of the Jurisdictional Statement:

> "The record does not support the dire predictions of the protestants. For some time there has been competition from the forwarders for less-than-truckload traffic which the motor carriers have been able to meet and still prosper. The evidence of record does not permit a finding that the forwarder rates under consideration will produce a diversion in traffic sufficient to imperil the abilities of the motor carriers to continue to survive and serve the public."

The plain import of the foregoing statement by the Commission is that because the motor carriers have in the past competed with forwarders for less-than-truckload traffic without impairment of their service they will be able to compete in the future for trailerload traffic. The decision of the Commission, as approved by the court below with respect to the national transportation system rests upon nothing more substantial than a *non-sequitur*.

In its second report, written for the obvious purpose of boistering up the first, the Commission did refer to the National Transportation Policy, but those references themselves fall woefully short of measuring up to the Commission's duty of deciding the issues in conformity to the mandate of that Policy. This is manifest from the Commission's own characterization of the Policy (J.S. 39a):

> "* * * Plainly, as we have stated repeatedly, this pronouncement does not mean that one transportation agency may be required to refrain from establishing rates which are reasonable and otherwise lawful in order to protect the traffic of a competing mode. * * *"

Insofar as the case at bar is concerned, a more vacuous statement could hardly be imagined. The precise issue is whether the rates and thereby the new service are reasonable and otherwise lawful in terms of effect on the national transportation system and the corresponding public interest therein. We reiterate that this is a subject as to which the Commission said nothing in either report.

The Commission's only other reference to the National Transportation Policy also appears in its second report as follows (J.S. 40a):

> "From all the evidence, we are satisfied that the considered rates are compensatory. Clearly, they are no lower than necessary to meet the existing competition. Under these circumstances, to refuse to permit the forwarders to maintain rates on the same level as those of the protestants would be tantamount to an attempt by us to apportion traffic artificially, and thereby to prevent normal, healthy competition and deny forwarders an op-

> portunity to compete fairly with motor carriers, contrary to the national transportation policy."

This again is a meaningless statement insofar as the present controversy is concerned for it completely avoids the important and fundamental issues presented. It might have some relevance to the Commission's duty under the National Transportation Policy if it followed a determination of the basic issues of lawfulness of the new forwarder service in favor of that service, but the statement by no stretch of the imagination constitutes a resolution of those issues.

This appeal raises the issue of the lawfulness of a new type of operation by freight forwarders which have heretofore been regulated, both as to operating authorities and rates, as consolidators of freight to be moved in the line-haul service and by the facilities and instrumentalities of the physical carriers. In their traditional service, the service authorized by the Interstate Commerce Act, the forwarders offer to shippers of less-than-truckload quantities at points of principal traffic importance a service not directly available to such shippers from the physical carriers. By the new service, forwarders would become tantamount to physical carriers of trailerload shipments between points of principal traffic importance and would offer the public nothing that is not directly available from the physical carriers. There has been utterly no discussion, finding, or conclusion by the Commission as to the consistency of this new operation with the goal of regulation set forth above. Indeed, the two reports of the Commission and the decision of the court below consistently avoid rather than decide the fundamental issues presented by this case.

It is clear, therefore, that the issues before this Court are of tremendous importance in the regulation of transportation and that probable jurisdiction should be noted.

Respectfully submitted,

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